STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 14, 2003
v	No. 228048 Washtenaw Circuit Court
WILLIAM BROOKE HOWELL Defendant-Appellant	LC No. 98-010180-FH

Before: Kelly, P.J., and Saad and Smolenski, JJ.

PER CURIAM.

Defendant was convicted of aggravated stalking, MCL 750.411i, and sentenced to twenty-one to sixty months' imprisonment. The conviction resulted from defendant's two-year course of conduct directed toward his former girlfriend. Defendant appeals as of right. We affirm.

I

Defendant first argues that the trial court erred in failing to provide counsel for him at a hearing to review his financial status for purposes of determining whether he was entitled to appointed counsel. We disagree. MCR 6.005 governs the determination of whether a defendant is indigent for purposes of obtaining counsel at public expense. The language of the rule does not support defendant's claim that counsel is required at the hearing. The rule describes a procedure in which the trial court questions the defendant directly. There is no requirement that a defendant be represented at the hearing. Indeed, the very purpose of the hearing is to determine whether the defendant should receive counsel at public expense. Defendant's reliance on *People v Jeske*, 128 Mich App 596; 341 NW2d 778 (1983) is misplaced. In that case, the defendant already had counsel when the trial court decided to review his need for appointed counsel. While the defense counsel was present at the indigence hearing, the trial court specifically refused to allow the defendant to confer with his counsel. *Id.* at 601. This Court affirmed that decision. *Id.* at 601-602. In doing so, it tacitly rejected that the defendant was entitled to the assistance of counsel at the hearing. We also reject defendant's argument that the indigence hearing is a critical stage of the proceedings. A critical stage is one where counsel's absence might derogate from the accused's right to a fair trial. *People v Kurylczyk*, 443 Mich 289, 296; 505 NW2d 528 (1993). Counsel's absence at an indigence hearing does not derogate a defendant's right to a fair trial or affect the determination of his guilt or innocence. After the

hearing, the defendant is either assigned counsel or informed of his right to obtain counsel at his own expense. He does not lose the right to counsel.

On appeal, defendant also challenges the trial court's determination that he was not indigent. We find that the trial court did not abuse its discretion in determining that defendant had sufficient resources to hire his own counsel and was not entitled to counsel at the public's expense. *People v Griffin*, 22 Mich App 101, 106; 177 NW2d 213 (1970). In ruling on the issue, the trial court heard testimony on all of the relevant factors, including defendant's employment, earning capacity, living expenses, debts, availability and convertibility of his assets, and other circumstances. MCR 6.005(B). Defendant had approximately $10,000 equity in his BMW, which was available and convertible. He also owned one-half of a $14,250 boat and there was no indication that this asset was not available or convertible. Further, defendant had no living expenses per se and owned a vehicle, other than his BMW, for transportation. The trial court set trial for more than three months after the date it determined that defendant would not receive court appointed counsel. This gave defendant ample time to sell his BMW and interest in the boat and retain counsel. The trial court did not abuse its discretion.

II

Defendant next argues that reversal is required because the trial court failed to conduct the necessary inquiry on the record before allowing him to proceed in propria persona. Again, we disagree.

A court may not permit a defendant to waive his right to be represented without advising him of the charge, the maximum possible prison sentence, the mandatory minimum sentence, and the risk involved in self-representation. MCR 6.005(D)(1). This rule applies to defendants who can retain counsel and to indigent defendants who are entitled to court appointed lawyers. See MCR 6.005(D)(2). After a defendant initially waives his right to counsel, the trial court must, at each subsequent proceeding, advise the defendant of his continuing right to counsel and affirm that the defendant continues to waive this right. MCR 6.005(E).

However, these rules are inapplicable in this case. Defendant never attempted to waive his right to counsel. The court determined that defendant was not entitled to a court-appointed attorney, but could retain one if he desired. Defendant never retained counsel after the indigence hearing. Rather, defendant continually asserted that he was indigent and that the only reason he was representing himself was because he could not afford to retain an attorney. It would be illogical for a court to be required to establish that a defendant voluntarily and intelligently waived his right to counsel, when the defendant wanted counsel, but was not represented merely because he refused to retain a lawyer. Clearly, a defendant who wants counsel is aware of the dangers of moving forward without counsel. Here, defendant was notified of the charge against him and the corresponding possible sentence at arraignment. After the indigence hearing, defendant was given three months before the next proceeding in which to attempt to retain a lawyer. The record indicates that defendant made no attempt to retain counsel, despite the fact that he was given ample time to do so. Therefore, we conclude that defendant was not unconstitutionally denied his right to counsel.

III

Defendant also argues that the trial court improperly denied his motion to conduct an in camera review of the victim's therapy records. A trial court's decision with respect to an in camera inspection is reviewed for an abuse of discretion. *People v Stanaway*, 446 Mich 643, 682; 521 NW2d 557 (1994).

In *Stanaway*, the Court set forth the following rule of law:

> [O]ur review of the jurisprudence of other states, along with our own precedent in dealing with discovery and evidentiary principles, coupled with a prudent need to resolve doubts in favor of constitutionality, prompts us to hold that in an appropriate case there should be available the option of an in camera inspection by the trial judge of the privileged record on a showing that the defendant has a good-faith belief, *grounded on some demonstrable fact*, that there is a reasonable probability that the records are likely to contain material information necessary to the defense. [*Id.* at 676-677; emphasis added.]

"The defendant's generalized assertion of a need to attack the credibility of his accuser [does] not establish the threshold showing of a reasonable probability that the records contain information material to his defense sufficient to overcome the various statutory privileges." *Id.* at 650.

In *People v Fink*, 456 Mich 449, 455; 574 NW2d 28 (1998), this Court reiterated that a defendant must establish a reasonable probability that the records are likely to contain material information. The touchstone of materiality is whether there is a reasonable probability that the evidence, if not suppressed, will lead to a different result at trial. *Id.* at 454. The Court also noted that it could not substitute its judgment for that of the trial court. *Id.* at 458.

In this case, defendant's request was a generalized one. He failed to show, and still has not shown, that there was a reasonable probability that the therapy records contained favorable information or information that would assist him in obtaining an acquittal. In other words, defendant had no good-faith belief, grounded on a demonstrable fact, that material information was in the records. Rather, he hoped that he could find evidence that would be helpful to his defense. He was clearly on a fishing expedition to find out whether there were any inconsistent statements in the therapy records or whether they contained any exculpatory information. His arguments at the motion hearings demonstrate his intent. Because defendant's request was general and based on speculation about what may be in the records, he was not entitled to an in camera review. *Fink, supra* at 458. The trial court did not abuse its discretion in ruling on his motion.

IV

Defendant next argues that the trial court's evidentiary decisions with respect to the admission of similar-acts evidence and evidence of defendant's contacts with the victim's acquaintances constitute an abuse of discretion. We disagree.

The trial court did not abuse its discretion in allowing a witness to testify about similar acts that defendant committed against her. The witness' testimony was admissible under MRE 404(b), which provides:

> (1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in this case.

In *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994), the Court clarified the test to be utilized to determine the admissibility of other bad acts evidence:

> First, that the evidence be offered for a proper purpose under Rule 404(b); second, that it be relevant under Rule 402 as enforced through Rule 104(b); third, that the probative value of the evidence is not substantially outweighed by unfair prejudice; fourth, that the trial court may, upon request, provide a limiting instruction to the jury.

In *People v Crawford*, 458 Mich 376, 385; 582 NW2d 785 (1998), the Court addressed the test set forth in *VanderVliet* and stated:

> Under this formulation, the prosecution bears the initial burden of establishing relevance of the evidence to prove a fact within one of the exceptions to the general exclusionary rule of MRE 404(b). Where the only relevance is to character or the defendant's propensity to commit the crime, the evidence must be excluded. Where, however, the evidence also tends to prove some fact other than character, admissibility depends on whether its probative value outweighs its prejudicial effect, taking into account the efficacy of a limiting instruction in cushioning the prejudicial effect of the evidence.

It is insufficient for the prosecution to merely recite one of the purposes articulated in MRE 404(b). *Id.* at 387. The prosecution must also demonstrate that the evidence is relevant. *Id.*

> Relevance is a relationship between the evidence and a material fact at issue that must be demonstrated by reasonable inferences that make a material fact at issue more probable or less probable than it would be without the evidence. . . . The logical relationship between the proffered evidence and the ultimate fact sought to be proven must be closely scrutinized. [*Id.*; citation omitted.]

The offered evidence "truly must be probative of something *other* than the defendant's propensity to commit the crime." *Id.* at 390 (emphasis in original).

In this case, the prosecutor articulated proper purposes for the use of the evidence, specifically to demonstrate that defendant intended to stalk the victim as opposed to merely

reinitiating their relationship, that the conduct was not an accident, and that defendant had a plan or scheme to embarrass and harass the victim.

The evidence was also logically relevant. To obtain a conviction under MCL 750.411i, the prosecution had to prove that defendant engaged in a willful course of harassment that caused the victim to feel terrorized, frightened, harassed, etc. In this case, the similar-acts evidence supported a finding that, more probably than not, defendant's course of conduct was willful and intended to harass and embarrass. It was therefore relevant to establish intent. MRE 401. Further, it was relevant to show a common plan or scheme. In *People v Sabin (After Remand)*, 463 Mich 43; 614 NW2d 888 (2000), the Court extensively analyzed the use of similar-acts evidence to establish a pattern, plan or scheme:

> Today, we clarify that evidence of similar misconduct is logically relevant to show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system. Logical relevance is not limited to circumstances in which the charged and uncharged acts are part of a single continuing conception or plot.
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> "To establish the existence of a common design or plan, the common features must indicate the existence of a plan rather than a series of similar spontaneous acts, but the plan thus revealed need not be distinctive or unusual. For example, evidence that a search of the residence of a person suspected of rape produced a written plan to invite the victim to his residence and, once alone, to force her to engage in sexual intercourse would be highly relevant even if the plan lacked originality. In the same manner, evidence that the defendant has committed uncharged criminal acts that are similar to the charged offense may be relevant if these acts demonstrate circumstantially that the defendant committed the charged offense pursuant to the same design or plan he or she used in committing the uncharged acts. Unlike evidence of uncharged acts used to prove identity, the plan need not be unusual or distinctive; it need only exist to support the inference that the defendant employed that plan in committing the charged offense." [*Id.* at 63, 65-66, quoting *People v Ewoldt*, 7 Cal 4th 380, 403; 867 P2d 757 (1994).]

In *Sabin, supra* at 66, the Court concluded:

> The charged and uncharged acts contained *common features* beyond mere commission of acts of sexual abuse. Defendant and the alleged victims had a father-daughter relationship. The victims were of similar age at the time of the abuse. Defendant allegedly played on his daughters' fear of breaking up the family to silence them. One could infer from these common features that defendant had a system that involved taking advantage of the parent-child relationship, particularly his control over his daughters, to perpetrate abuse.

> We acknowledge that the uncharged and charged acts were dissimilar in many respects.
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> This case thus is one in which reasonable persons could disagree on whether the charged and uncharged acts contained sufficient common features to infer the existence of a common system used by defendant in committing the acts. As we have often observed, the trial court's decision on a close evidentiary question such as this one ordinarily cannot be an abuse of discretion. [Emphasis added.]

In this case, the witness' testimony demonstrated that defendant had a pattern, plan or scheme of acting against women who broke off their relationships with him. The uncharged conduct had many features in common with the charged conduct. Defendant's actions toward the similar-acts witness consisted of making hang-up telephone calls, sending unsolicited cards, sending troublesome communications to people associated with the witness, and attempting to interfere with the witness' personal relationships, activities which also occurred with respect to the victim. In sum, the charged conduct and the similar acts had sufficient common features to infer a plan, scheme or system of acting. Even if this was a close case, we would not second guess the trial court's decision. *Sabin, supra* at 67.

We also reject defendant's claim that the evidence should have been precluded under MRE 403. Like all evidence negative to a defendant, there was a potential for prejudice. This was not a situation, however, where marginally probative evidence may have been given undue or preemptive weight by the jury. *Crawford, supra* at 398.

Finally, a cautionary instruction was given. On appeal, defendant argues that the instruction given in mid-trial was confusing and necessitates reversal. Defendant did not object at trial to the instruction, and fails on appeal to cite to any authority to support his argument or explain why the instruction requires reversal. The issue is therefore abandoned. *People v Kelly,* 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Regardless, however, the trial court gave a coherent instruction with respect to the MRE 404(b) evidence before the jury retired to deliberate. We find there is no error requiring reversal.

Defendant also argues that evidence of his communications with the victim's friends and acquaintances was improperly admitted. Again, we disagree. We note that this is not simply an evidentiary issue. Defendant is questioning whether certain conduct, the mailing of the cards and pictures to people other than the victim, is conduct falling within the statute. "The decision whether alleged conduct falls within the statutory scope of a criminal law involves a question of law, which this Court reviews de novo." *People v Noble,* 238 Mich App 647, 658; 608 NW2d 123 (1999).

The stalking statutes address a willful pattern of conduct designed to harass, embarrass, terrify or cause emotional distress. *People v White,* 212 Mich App 298, 310-311; 536 NW2d 876 (1995). The purpose of the statutes is to prohibit the defendant's unconsented contact with the victim where the contact is aimed at intimidating, embarrassing, or frightening the victim. *Id.* "The conduct must be initiated or continued without the victim's consent or in disregard of the

victim's desire to discontinue the contact." *Id.* at 310. While MCL 750.411i sets forth a list of impermissible conduct, it also includes language that indicates that the list is not inclusive.

In this case, defendant's acts of sending cards and nude pictures of the victim to her acquaintances was willful conduct clearly directed to affect the victim. Although indirect, defendant's actions were designed to embarrass and harass the victim and to interfere with her relationships. This course of conduct was initiated and continued without the consent of the victim and in disregard of her desire for defendant to stop the contacts. The trial court correctly ruled that the evidence was directly relevant and admissible, as the conduct was encompassed by the statute.

V

Defendant next argues that Michigan's stalking statutes are unconstitutional. However, this Court has previously decided that the stalking statutes are constitutional. *White, supra* at 308-315; *People v Ballantyne*, 212 Mich App 628, 628-629; 538 NW2d 106 (1995). These prior decisions with respect to constitutionality are binding on this panel. MCR 7.215(I)(1). The case on which defendant relies, *Staley v Jones*, 108 F Supp2d 777 (WD Mich, 2000), is not binding on this Court, *People v Chavies,* 234 Mich App 274, 282; 593 NW2d 655 (1999), and furthermore, *Staley* was reversed, 239 F3d 769 (2001).

VI

Defendant next argues that he was entitled to a specific unanimity instruction and that the trial court's failure to give such an instruction constitutes error requiring reversal. This issue is not preserved where it was not raised before or decided by the trial court. *People v Connor*, 209 Mich App 419, 422; 531 NW2d 734 (1995). Accordingly, we review this issue for plain error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

MCL 750.411i provides that a person is guilty of aggravated stalking if *at least one* of the actions constituting the offense occurs in violation of a restraining order, provided the individual has received notice of the restraining order. In this case, there was evidence that defendant made several hang-up telephone calls to the victim after he was served with the personal protection order (PPO). Defendant argues that because there was more than one act that could have led to his conviction, the jury should have been required to agree on which act formed the basis for the conviction. This argument has no merit. Because none of the post-PPO telephone calls were materially distinct from the others and because there was no reason to believe that the jurors may have been confused or disagreed about the factual basis for defendant's guilt, a special unanimity instruction was unnecessary. *People v Cooks*, 446 Mich 503, 530; 521 NW2d 275 (1994). A general unanimity instruction was sufficient under the circumstances. *Id.*

VII

Defendant also argues that the trial court wrongly denied his request for a bill of particulars. We disagree. When charging defendant, the prosecution did not use a statutory short form indictment. MCL 767.44 allows for the use of short form indictments for particular offenses, and states:

> Provided, That the prosecution attorney, if seasonably requested by the respondent, shall furnish a bill of particulars setting up specifically the nature of the offense charged.

In *People v Harbour,* 76 Mich App 552, 556; 257 NW2d 165 (1977), this Court ruled that this language is a proviso to the section setting forth the statutory short forms of indictment. "The proviso does not apply where, as here, the indictment is not in one of the statutory short forms." *Id.* A bill of particulars was not mandatory in that case and could have been granted only at the discretion of the trial court. *Id.* at 556-557. The *Harbour* Court ruled that where a "preliminary examination adequately informs a defendant of the charge against him, the need for a bill of particulars is obviated." *Id.* at 557; *People v Rice,* 101 Mich App 1, 13; 300 NW2d 428 (1980), rev'd on other grounds 411 Mich 883 (1981).

A short form indictment for stalking is not set forth in MCL 767.44. Thus, the proviso did not apply and defendant was not automatically entitled to a bill of particulars at his request. Under the circumstances in this case, the trial court had discretion to grant the request and did not abuse that discretion by denying the request. An extensive preliminary hearing took place and defendant was also provided with substantial discovery, both of which served to inform him of the specific conduct for which he was charged.

VIII

Finally, defendant argues that the trial court abused its discretion with respect to three items of discovery: (1) a particular report from the Tiburon, California Police Department, along with any accompanying notes, (2) audio recordings of interviews conducted by the Tiburon, California Police Department with defendant, the victim, and two witnesses, and (3) information about a second telephone line that the victim may have had in her home. We review the trial court's discovery rulings for an abuse of discretion. *Stanaway, supra* at 680; *People v Traylor,* 245 Mich App 460, 464; 628 NW2d 120 (2001).

With respect to the particular police report, defendant received the report before trial started. While we acknowledge that defendant claimed that the report he received was a forgery, he has offered no support for this contention. Moreover, the record does not indicate that the trial court denied defendant's request for this report or interfered with his ability to obtain the report. The trial court required the prosecutor to attempt to obtain the report and, when she did, she immediately turned it over to defendant.

With respect to the audio recordings, the record is clear that the prosecutor copied the taped interviews that were in her possession. Those tapes were given to defendant. The trial court did not deny defendant's requests for copies of existing audio tapes and they were received by defendant before trial. Thus, the trial court did not deny defendant that material evidence.

Finally, with respect to the information about a second telephone line the victim may have had, we find that the trial court did not abuse its discretion. The trial court denied the discovery on the ground that the information sought was irrelevant. Defendant argues only that it was relevant to demonstrate the trial court's bias. This argument is convoluted and relates to a

collateral issue that defendant attempted to inject into trial. The trial court properly denied the discovery on the grounds that it was irrelevant to any material issue at trial.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Henry William Saad
/s/ Michael R. Smolenski